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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

CLARENCE MILTON CALHOUN,
ALVIS EARL LANHAM, and
J. B. RUSSELL,

Petitioners

—versus—

UNITED STATES OF AMERICA,

Respondent

No. 725

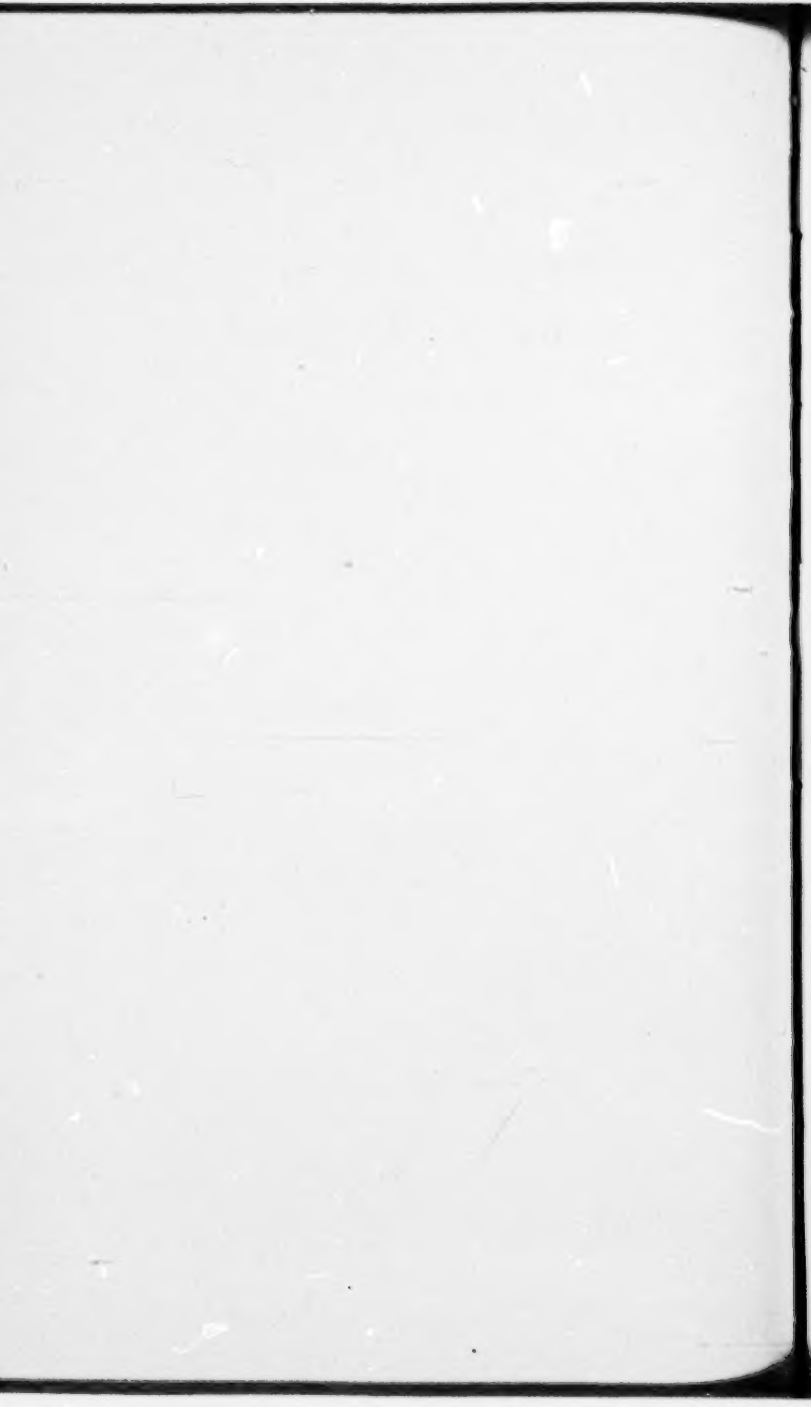
PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT OF PETITION

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I N D E X

SUBJECT INDEX

	<i>Page</i>
Petition for Ceterioari.....	1
Summary Statement of Matters Involved.....	2
Jurisdiction	4
Questions Presented.....	4
Reasons for Allowance of Writ.....	5
Conclusions and Signatures.....	6
Brief in Support of Petition.....	7
Statement of the Case.....	7
Assignment of Errors.....	7
Argument Under First Assignment of Error.....	8
Argument Under Second Assignment of Error.....	9
Conclusions and Signatures.....	10

AUTHORITIES

Amos vs. United States, 41 S. Ct. 266.....	5, 9
Brown vs. United States, 83 Fed. (2) 383.....	5, 10
Johnson vs. United States 68 S. Ct. 368.....	5, 9
Ray vs. United States, 84 Fed. (2) 654.....	5, 9
United States vs. Asendio, 171 Fed. (2) 122.....	5, 9

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE, AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Your petitioners, CLARENCE MILTON CALHOUN,
ALVIS EARL LANHAM and J. B. RUSSELL, respect-
fully show as grounds for the issuance of a Writ of
Certiorari to the United States Court of Appeals for the
Fifth Circuit:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

About nine o'clock P. M., on the 18th day of February, 1948, the Chief of Police of Monahans, Texas, observed an automobile occupied by three men,—one of whom he thought was Calhoun. The officer took the license number of the car. He followed the car and saw it stop near a jewelry store, pass the Post Office several times, and on one occasion stop about a block from the Post Office.

On the morning of February 19, 1948, the Post Master at Monahans discovered that the Post Office had been burglarized. A report of the burglary was made to the City Police and to the Chief of Police. The Chief of Police notified the Postal Inspector at Abilene, Texas, and called the Department of Public Safety at Austin, Texas. He learned that the license on the car he had observed the night before had been issued in the name of Lanham, and that Lanham had a criminal record. During the day of the 19th of February, 1948, the Post Office Inspectors arrived in Monahans and took charge of the investigation.

On the evening of February 19, 1948, the officers in Monahans went to Odessa, Texas, some thirty-five miles distance, to Lanham's home. Lanham and Russell were sitting in the car in front of Lanham's home when the officers arrived. They were arrested and taken to the Sheriff's office at Odessa. At the Sheriff's office in Odessa, in the presence of two officers from Monahans, two from Odessa, and the Postal Inspectors, several of whom were armed, Lanham and Russell were questioned

but the officers got no information from them except where they lived. Lanham was cursed by one of the officers, but not otherwise abused at that particular time. At this instant, under the record, the officers were not possessed of information sufficient to have obtained a valid search warrant. At the Sheriff's office Lanham was told that the officers wanted to search his home at Odessa; that they did not have, but could obtain, a search warrant. Lanham replied that he could not keep them from searching his house. The officers, with Lanham in custody, returned to Lanham's house. Lanham unlocked the door (because he did not want the officers to break it in) and opened the door because the officers were armed, and he feared physical violence to his person (which he subsequently received). The officers entered his home (without any search warrant) and there found money including a roll of coins which subsequently developed to bear the finger prints of a clerk employed at the Post Office in Monahans. It was the finding of this money, and particularly the wrapped coins, that connected Lanham with the offense.

The room occupied by Calhoun in a house belonging to Sam Tomme, was searched and there was found a torn one dollar bill subsequently identified by a clerk employed at the Monahans Post Office as having been stolen.

Motions to suppress such evidence on the ground that it was unlawfully obtained by Government officers without search warrants, were overruled by the Court.

Upon trial Petitioners were convicted and sentenced to five years confinement, and a fine of \$500.00 for the burglary, and three years cumulative confinement for theft.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the trial Court holding that Lanham had waived his constitutional rights and consented to the search of his home; that Calhoun had no authority over the room he occupied in the home of Tomme and therefore could not question the search of his room by the officers without his consent and without a search warrant since Tomme had consented to such search.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on February 16, 1949, and petition for rehearing was denied on March 15, 1949.

The controlling questions before the Court are: (1) whether Lanham voluntarily waived his constitutional rights and consented to the search of his home, without warrant; and, (2) the admissibility of the evidence discovered by the search of the room of Calhoun, made without his consent, and without search warrant.

JURISDICTION

Petitioners rely upon Rule 38, of the Rules of the Supreme Court of the United States as conferring jurisdiction because the decision of the Court of Appeals in this case conflicts with the decisions of other Courts of Appeals and of the Supreme Court of the United States on the same matters.

QUESTIONS PRESENTED

The propositions involved herein, are as follows: (1) Did Lanham voluntarily waive his rights under the Fourth Amendment to the Constitution of the United States and consent to the search of his home without

warrant so as to render admissible against him the fruits of such search; and (2) did Calhoun have sufficient control over the room he occupied in the Tomme residence to have the protection of the Fourth Amendment to the Constitution of the United States, and render inadmissible as evidence the fruits of the search of his room without his consent and without a search warrant?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

Your petitioners contend that a Writ of Certiorari should be allowed and that the decision of the United States Court of Appeals be reversed by this Court for the following reasons: (1) The decision of the Court of Appeals in this case that Lanham voluntarily waived his constitutional rights and consented to the search of his home is in conflict with the decision of this Court in *Johnson vs. United States*, 68 S. Ct, 367, and *Amos vs. United States*, 255 U. S. 313; the decision of the Court of Appeals for the Third Circuit in *U. S. vs. Asendio*, 171 Fed. (2) 122; and the decision of the Court of Appeals for the Fifth Circuit in *Ray vs. U. S.* 84 Fed. (2) 654.

The decision of the Court of Appeals in this case holding that Calhoun did not have sufficient control of the room he occupied in Tomme's home to have the protection of the Fourth Amendment of the Constitution of the United States is contrary to the decision of the Court of Appeals for the Third Circuit in *Brown vs. U. S.* 83 Fed. (2) 383.

WHEREFORE, your Petitioners respectfully pray that Writ of Certiorari issue out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, and that the judgment of the United States Court of Appeals be reversed by this Court, and your petitioners pray for such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

CLARENCE MILTON CALHOUN,
ALVIS EARL LANHAM,
J. B. RUSSELL,

Petitioners

By William H. Faxon
Counsel for Petitioners

IN THE
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CLARENCE MILTON CALHOUN,
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Respondent

BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

May it please the Court:

STATEMENT OF THE CASE

Reference is here made to the summary statement in the petition which is made a part of this brief.

ASSIGNMENTS OF ERROR

1. The Trial Court and the Court of Appeals erred in holding that Lanham waived his constitutional rights and

consented to the search of his home, thereby rendering admissible the evidence thus obtained by Government officers without a warrant.

2. The Trial Court and the Court of Appeals erred in holding that Calhoun's occupancy of the room in the Tomme home was not of such character as to afford him protection of the Fourth Amendment to the Constitution of the United States, and permit him to complain of evidence found by government officers in a search of his room made without his consent and without a warrant.

ARGUMENT UNDER FIRST ASSIGNMENT OF ERROR

The principles of law involved herein are of fundamental importance to the general public, and especially to those who are accused of crime and brought to trial in a court of law. In this case there were no exceptional circumstances justifying, in the name of effective law enforcement, the invasion of Lanham's home without a warrant. He was under arrest and the premises were permanent and no evidence was threatened with removal or destruction. As a matter of fact, under the record, the only information the government officers had prior to the search of Lanham's home was a suspicion that Lanham may have been connected with the burglary because his car had been seen near the Post Office and Lanham had a criminal record. Lanham was told, so the officers testified, that they did not have a warrant, but could obtain one. We submit that the officers did not have any information constituting probable cause, and that they could not have obtained a valid warrant.

The Government's sole contention with respect to the search is that Lanham consented to the search. However, when due consideration is given to the attending circumstances, petitioner's "go ahead", and "I can't stop you" did not constitute consent. It was a submission to armed authority after verbal abuse with fear of personal violence which he subsequently received, rather than a voluntary waiver of his constitutional right. It is respectfully submitted that the Trial Court and the Court of Appeals departed from the principles laid down in the Johnson, Di Re, and Truliano cases.

The Government cannot be permitted to justify the arrest and search simply by what the search revealed.

The decision conflicts with Johnson vs. United States, 68 S. Ct. 367; Amos vs. United States, 41 S. Ct. 266; United States vs. Asendio, 171 Fed. (2) 122; Ray vs. United States, 84 Fed. (2) 654.

ARGUMENT UNDER SECOND ASSIGNMENT OF ERROR

Calhoun was a roomer in a house owned by Sam Tomme. He did not pay rent, but Calhoun had the full use and occupancy of this particular room. Calhoun did not consent to its search by government officers and was not present at the time of the search. Tomme permitted the officers to enter his home and let them into the room occupied by Calhoun. We cannot see how this type of search could be justified any more than one made of a hotel room or an apartment where government officers are given access to a room though the services of a bell boy or maid, or caretaker. It was held in Brown vs.

United States, 83 Fed. (2) 383, that roomers in a private dwelling were protected by constitutional prohibition of unreasonable search and seizure.

WHEREFORE, petitioners respectfully pray for a review of the decision of the Court of Appeals for the Fifth Circuit, and that the judgment be reversed.

Respectfully submitted,

William H. Day

Counsel for Petitioners



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	8

CITATIONS

Statutes:

Criminal Code:

Section 47 (18 U.S.C. [1946 ed.] 100)	2
Section 192 (18 U.S.C. [1946] ed. 315)	2



In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 725

CLARENCE MILTON CALHOUN, ALVIS EARL LANHAM,
AND J. B. RUSSELL, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 313-316) is reported at 172 F. 2d 457.

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1949 (R. 316), and a petition for rehearing (R. 317-319) was denied March 15, 1949 (R. 320). The petition for a writ of certiorari was filed April 14, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court was warranted in finding that petitioner Lanham consented to the search of his home without a warrant.

2. Whether there was any search or seizure of which petitioner Calhoun had standing to complain.

STATEMENT

Petitioners were charged in a two-count indictment (R. 1-2) filed in the District Court for the Western District of Texas with forcibly breaking into a post office with intent to commit larceny therein (count 1), and with the theft therefrom of Government-owned money and other property (count 2), in violation of §§ 192 and 47 of the Criminal Code (18 U.S.C. [1946 ed.] 315, 100), respectively. Following a jury trial, each was found guilty on both counts (R. 289), and each was sentenced to five years' imprisonment and a \$500 fine on the first count and to three years' imprisonment on the second count, the latter term to commence at the expiration of the five-year sentence on the first count (R. 292-293). On appeal to the Court of Appeals for the Fifth Circuit, the judgments of conviction were affirmed (R. 316).

It is unnecessary to review the evidence supporting the convictions since petitioners do not question its sufficiency. The evidence is summarized in the opinion of the Court of Appeals (R. 314-315).

Prior to trial, petitioner Lanham moved to suppress the use as evidence of certain currency and

rolls of coins alleged to have been unlawfully seized from his home in a search without a warrant (R. 7-8). In a similar motion, petitioner Calhoun alleged that certain additional currency had been unlawfully seized "from him" in a search of different premises, also without a warrant (R. 10). The moneys involved in these motions were subsequently identified at the trial as part of the loot taken from the burglarized post office. Following a hearing (R. 14-62), both motions were denied without opinion (R. 8-9, 11-12, 62).

With respect to Lanham's motion, it was the Government's contention at the hearing that Lanham freely consented to and in fact cooperated in the search of his home without a warrant. With respect to Calhoun's motion, the Government's position was that Calhoun had no standing to object to a search, without warrant, of the premises described in his motion; and that in fact there was no search or seizure at all in view of the fact that the owner and occupant of the premises in question, one Tomme, waiving all requirements with respect to a warrant, freely admitted the officers to his home and voluntarily surrendered to them the money they sought, which was in his custody. The evidence adduced at the hearing in support of these contentions may be summarized as follows:

Lanham's motion.—Morrow, a post office inspector, testified that Lanham, shortly following his arrest, was interviewed by Morrow and several local peace officers in the local sheriff's office (R. 15, 25).

According to Morrow, Sheriff Ratliff said to Lanham, "Chick, we want to search your house. Now, we can get a search warrant or you can let us search it," to which Lanham replied, "I know you can get a warrant. Go ahead and search it" (R. 26, 29). According to police chief Ragsdale, who was also present, Lanham freely admitted to the officers that he had "some money down at the house" and offered to "take you down there and get the money" (R. 38). Lanham, accordingly, accompanied the officers to his home, unlocked the door himself, proceeded directly to a dresser drawer, removed the currency in question, and delivered it to the officers (R. 26). The rolls of coins were subsequently found by one of the officers in a box under the kitchen sink (R. 26-27, 42). At no stage of the proceedings was Lanham subjected to any compulsion, threats, or abuse (R. 30). In fact, Lanham at all times engaged in "good natured talk back and forth" with the officers (R. 28).

Morrow further testified that he knew "the laws relating to search warrants" and that the only reason he did not apply for a search warrant was the fact that Lanham consented to the search without a warrant ¹ (R. 27).

¹ The issue of whether or not Lanham consented to a search of his home without a warrant was also raised subsequently at the trial (R. 103-104). At that time, police chief Ragsdale testified that, after Lanham first consented to the search, he was asked, "Are you sure you do not require a search warrant?" and that Lanham made it perfectly clear that he had no objection to the search (R. 105).

Calhoun's motion.—Tomme, a cousin of Calhoun (see R. 200), testified that he, Tomme, resided with his wife and child in his own home at 802 Roxana Street, Odessa, Texas (R. 56). He permitted Calhoun to occupy a room in his home occasionally under an informal arrangement which did not involve the payment of rent (R. 56-57). Shortly following the theft from the post office, as charged in the indictment, Calhoun turned some currency over to Tomme with the request that he "put it away for him" (R. 57; see R. 201). Tomme placed the money in a locker under the bed in the room occupied by Calhoun, and locked the locker (R. 57, 59). This locker was the property of Tomme, and the key to it was kept by Tomme's wife (R. 59; see also R. 201-2). Tommie's reason for putting the money in this locker was to prevent his baby son from getting at it. Shortly thereafter, post office inspector Bell and several local peace officers went to Tomme's home and asked Tomme whether Calhoun had given him any money. Tomme replied in the affirmative, and told the officers where he had put the money. The officers asked Tomme "if they had to have a warrant to search the house." According to Tomme, "I told them no, and I went down and unlocked the locker and gave [the money] to them." (R. 58.) Tomme testified that he freely admitted the officers to his home, and "voluntarily turned over that money to the officers, at their request" (R. 59-60; see also R. 202).

Bell, the post office inspector who was among the officers who visited Tomme's home, corroborated Tomme's testimony in all respects (R. 60-61). Tomme told the officers, Bell added, that Calhoun "stayed with him a part of the time," that the room in which the locker was located "was occupied by Mr. Calhoun at the time he stayed there," and that the room "was also used by his [Tomme's] family" (R. 61). Bell further testified that Tomme's "family's clothes were hanging up in that room" (R. 61-62).

ARGUMENT

1. Petitioner Lanham contends that he did not freely consent to the search of his home without a warrant (Pet. 8-9), arguing that his "consent" was in reality merely "a submission to armed authority after verbal abuse with fear of personal violence * * *, rather than a voluntary waiver of his constitutional right" (Pet. 9). It is clear, however, that in making this contention, Lanham assumes that the trial judge, who heard the witnesses in connection with the motion to suppress, was required to believe his version of the circumstances surrounding the giving of his consent to the officers (see Pet. 3). But Lanham's testimony, which was uncorroborated, was sharply contradicted by the officers. We have set forth the officers' testimony at pp. 3-4, *supra*, and submit that, if true, it plainly established consent to the search on Lanham's part. Indeed, so far as the

currency, at least, was concerned, there was no search at all, since Lanham voluntarily procured and surrendered it to the officers. The trial judge, after hearing the witnesses, accepted the officers' testimony, and the court below expressly concurred in this finding (R. 315). There is clearly no occasion for this Court to reexamine this factual issue.

2. Petitioner Calhoun contends that "the search" of "his" room in Tomme's house, without a warrant and without his (Calhoun's) consent, was an invasion of his rights under the Fourth Amendment, and rendered the fruits of "the search" inadmissible in evidence against him (Pet. 3, 5). The contention, however, ignores the facts, summarized above (*supra*, pp. 5-6), which were brought out at the hearing on the motion to suppress. Those facts—and they were uncontradicted—established that there was in reality no search or seizure at all. Tomme voluntarily admitted the officers to his home and freely admitted his receipt of money from Calhoun. Expressly waiving all requirements relative to a search warrant, Tomme led the officers to the room in his house where he himself had secreted the money in a locker, unlocked the locker, and handed the officers the money. The locker was Tomme's property, the key to it was kept in his wife's custody, and Tomme clearly had a right to enter this room in his own house. The bare fact, on which alone Calhoun relies, that Calhoun was permitted by Tomme to

occupy this room occasionally has no relevance in the light of these facts.²

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JUNE 1949.

² Lanham's and Calhoun's codefendant at the trial, Russell, is named as a petitioner in the petition for certiorari, but the petition makes no contention applicable to him.